

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
MCImetro Access Transmission Services LLC)
Petition for Preemption of the Jurisdiction of) CC Docket No 02-283
the New York Public Service Commission)
Pursuant to Section 252(e)(5) of the)
Communications Act of 1934, as Amended)
)

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2002

Released: November 26, 2002

By the Chief, Common Carrier Bureau

I. INTRODUCTION

1. This Memorandum Opinion and Order addresses the petition of MCImetro Access Transmission Services LLC (MCImetro) for preemption of the jurisdiction of the New York Public Service Commission (New York commission) with respect to a dispute concerning the interpretation and enforcement of its interconnection agreement with Verizon New York, Inc. (Verizon).¹ Specifically, MCImetro seeks preemption of the jurisdiction of the New York commission pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (the Act).²

¹ Petition of MCImetro Access Transmission Services LLC Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the New York Public Service Commission Regarding Interpretation and Enforcement of Interconnection Agreement, CC Docket No. 02-283 (filed Sept. 6, 2002) (MCImetro Petition); see *Pleading Cycle Established for Comments on Petition of MCImetro Access Transmission Services LLC Pursuant to Section 252(e)(5) of the Communications Act for Expedited Preemption of the Jurisdiction of the New York Public Service Commission Regarding Interpretation and Enforcement of Interconnection Agreement*, CC Docket No. 02-283, Public Notice, DA-02-2298 (rel. Sept. 17, 2002) (Sept. 17 Public Notice). On October 2, 2002, Verizon and the NY DPS filed comments. On October 9, 2002, MCImetro and Verizon filed reply comments.

² 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. §§ 151 *et seq.* Hereafter, all citations to the 1996 Act will be in accordance with its codification in Title 47 of the United States Code.

2. Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission “fails to act to carry out its responsibility under [section 252].”³ Section 252 of the Act sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier (LEC).⁴

3. In its petition, MCImetro alleges that the New York commission’s failure to resolve its interconnection dispute with Verizon constitutes a “failure to act” triggering this Commission’s section 252(e)(5) duty to preempt the jurisdiction of the New York commission. For the reasons set forth below, we grant MCImetro’s petition.

II. BACKGROUND

4. MCImetro, a competitive LEC in New York, and Verizon, the incumbent LEC in New York, have a contractual dispute over the treatment of reciprocal compensation for traffic bound for Internet service providers (ISPs) (ISP-bound traffic) under the terms of their 1997 interconnection agreement, and in light of the New York commission’s 1999 Order addressing this issue and this Commission’s April 2001 *ISP Remand Order*.⁵ Specifically, MCImetro seeks resolution of the following three issues: (1) whether any provision of the interconnection agreement allows Verizon unilaterally to withhold reciprocal compensation payments due pursuant to the agreement and the New York commission orders; (2) whether the *ISP Remand Order* constitutes a change of law under paragraph 8.2 of the agreement triggering the obligation to amend the agreement; and (3) if any amendment is required, what is the effective date of the amendment under paragraph 20.16 of the agreement.⁶

5. Neither MCImetro nor Verizon sought resolution of their dispute by the New York commission;⁷ however, Verizon earlier had filed six petitions with the New York commission seeking resolution of contractual disputes with other competitive LECs regarding reciprocal compensation for ISP-bound traffic.⁸ On August 7, 2002, the New York Department of Public Service (NY DPS), which functions as the New York commission staff, issued a letter to Verizon in these six proceedings stating that the New York commission “will not address the

³ 47 U.S.C. § 252(e)(5).

⁴ See generally 47 U.S.C. § 252.

⁵ See MCImetro Petition. See also MCImetro September 17, 2002 Erratum (attaching a complete copy of *Proceeding on Motion of the Commission to Reexamine Reciprocal Compensation*, Case No. 99-C-0529, Opinion and Order (New York Commission Aug. 26, 1999)); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Red 9151 (rel. Apr. 27, 2001), *remanded*, 288 F.3d 429 (D.C. Cir. 2002) (*ISP Remand Order*).

⁶ MCImetro Petition at iv and 6 n.18.

⁷ See MCImetro Petition at 6, 8.

⁸ See MCImetro Petition at iii and 6.

six dispute resolution petitions” and that “because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic.”

6. Relying on this language, on September 6, 2002, MCImetro filed a petition for preemption with this Commission alleging that the New York commission “failed to act” to resolve its reciprocal compensation dispute with Verizon.¹⁰ On September 17, 2002, the Commission issued a public notice requesting comment on MCImetro’s petition.¹¹

7. On October 2, 2002, Verizon and the NY DPS filed comments. Verizon asks that the “Commission preempt and at the same time summarily reject MCImetro’s position on the merits.”¹² In its comments, the NY DPS explains that MCImetro’s petition for preemption “arises from New York’s decision to refrain from immersing itself in an MCI and Verizon dispute over the reciprocal compensation provisions of their interconnection agreement.”¹³ Although the NY DPS does not object to resolution of this matter by the Commission, it does oppose section 252(e)(5) preemption as the jurisdictional basis for Commission review.¹⁴ Verizon and MCImetro filed reply comments on October 9, 2002.

III. DISCUSSION

8. We conclude that the circumstances presented by MCImetro require us to assume the jurisdiction of the New York commission. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state “fails to act to carry out its responsibility under [section 252].”¹⁵ The Commission’s rules address the context of a state’s “failure to act” with respect to a state’s mediation and arbitration responsibilities pursuant to section 252.¹⁶ In the *Starpower Preemption Order*, the Commission

¹⁰ Letter of Janet Hand Deixler, Secretary, New York DPS, to Gayton P. Gomez, Esq., Verizon New York, Inc., dated Aug. 7, 2002, MCImetro Petition, Exhibit I (NY DPS Aug. 7, 2002 letter).

¹¹ See MCImetro Petition.

¹² See Sept. 17, 2002 Public Notice.

¹³ Verizon Comments at 1.

¹⁴ NY DPS Comments at 1. The NY DPS further explains that the “NYPSC chose not to review the interconnection dispute because it involved contract interpretation questions turning on the FCC’s use of the term ‘reciprocal compensation.’” *Id.*

¹⁵ Specifically, the NY DPS states that “[w]hile NYPSC has no objection to the FCC attempting to resolve this contract dispute, we would take issue with a holding that New York had a statutory § 252 duty to determine Verizon’s and MCI’s contractual intent regarding the term ‘reciprocal compensation.’” *Id.* NY DPS requests that the Commission resolve this dispute pursuant to its section 208 authority. See *id.* at 2. See also 47 U.S.C. § 208.

¹⁶ 47 U.S.C. § 252(e)(5).

¹⁷ Section 51.801(b) provides: “For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act. (continued....)”

further determined that a dispute involving interpretation and enforcement of an interconnection agreement also falls within a state's responsibilities under section 252.¹⁷ Specifically, the Commission stated: "In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' responsibility under section 252. We conclude that it is."¹⁸ In *Starpower*, the Commission granted a petition for section 252(e)(5) preemption because the Virginia commission declined to take jurisdiction over contractual disputes involving reciprocal compensation of ISP-bound traffic.¹⁹

9. We find that MCI Metro's petition falls squarely within Commission precedent, presents no novel questions of fact, law or policy and, therefore, we resolve this petition pursuant to our delegated authority.²⁰ Following the Commission's guidance in the *Starpower Preemption Order*, we find that the New York commission has "failed to act" with regard to the interconnection dispute between MCI Metro and Verizon. As in *Starpower*, the state commission in this case has expressly declined to interpret or enforce the terms of an interconnection agreement. Specifically, both the August 7, 2002 letter to Verizon and the October 2, 2002 comments filed by the NY DPS in this proceeding unequivocally express an intent not to act to

(Continued from previous page)

or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(c) of the Act." 47 C.F.R. §51.801(b).

¹⁷ *In the Matter of Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, *Memorandum Opinion and Order*, 15 FCC Red 11277, 11279, para. 6 (2000) (*Starpower Preemption Order*). Although the Commission has taken a clear position on this issue, the New York Commission disagrees with this reading of its obligations under section 252. See NY DPS Comments at 1-2. Further, though federal courts of appeal have divided on this issue, a majority of circuits has recognized that states have authority pursuant to section 252 to resolve disputes arising out of interconnection agreements. See *Global Naps, Inc. v. FCC*, 291 F.3d 832, 838 (D.C. Cir. 2002); *MCI Telecommunications Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 511 (3rd Cir. 2001), cert. denied sub nom. *Pennsylvania Public Utilities Commission v. MCI Telecommunications*, 2002 WL 554458 (U.S. Oct. 7, 2002); *Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000); *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000); *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 480 (5th Cir. 2000); *Illinois Bell Telephone Company v. WorldCom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999). But see *BellSouth Telecommunications, Inc., et al. v. MCI Metro Access Transmission Services, Inc.*, 278 F.3d 1223, 1232-35 (11th Cir. 2002), vacated pending rehearing en banc, 297 F.3d 1276 (11th Cir. July 17, 2002) (holding that states lack authority under federal statute to resolve disputes arising from interconnection agreements); *Bell Atlantic Maryland v. MCI WorldCom*, 240 F.3d 279 (4th Cir. 2001), vacated on other grounds and remanded sub nom. *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S.Ct. 1753 (2002) (holding that states have authority under state law to address disputes arising from interconnection agreements).

¹⁸ See *Starpower Preemption Order*, 15 FCC Red at 11279 para. 6.

¹⁹ See *Starpower Preemption Order*, 15 FCC Red at 11280, para. 7. See also *In the Matter of Cox Virginia Telecom, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-126, *Memorandum Opinion and Order*, 15 FCC Red 17958 (CCB 2000).

²⁰ See 47 C.F.R. §§ 0.91, 0.291

resolve the parties' interconnection dispute regarding reciprocal compensation for ISP-bound traffic. In its August 7, 2002 letter to Verizon, the New York DPS states: "because adequate, alternative forums exist, the Department will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."²¹ Additionally, in its October 2, 2002 comments filed in this proceeding, the New York DPS explains that MCI Metro's petition "arises from New York's decision to refrain from immersing itself in an MCI and Verizon dispute over the reciprocal compensation provisions of their interconnection agreement."²² The New York DPS further explains that the "NYPSC chose not to review the interconnection dispute because it involved contract interpretation questions turning on the FCC's use of the term 'reciprocal compensation.'"²³ Therefore, we conclude that the New York commission has "failed to act to carry out its responsibility" under section 252. Accordingly, the Act compels us to assume the jurisdiction of the New York commission and resolve the outstanding interconnection dispute.

10. The NY DPS requests that "rather than review MCI's claim under § 252(e)(5), which authorizes FCC preemption of state responsibilities, the Commission should exercise its § 208 authority" to resolve the parties' interconnection dispute.²⁴ Verizon disputes the applicability of section 208 to this dispute and opposes the NY DPS's request.²⁵ Because we find that the statute, our implementing rules and Commission precedent compel us to preempt the jurisdiction of the state commission in this case, we do not address the New York commission's suggestion that we resolve this dispute pursuant to our section 208 authority.

11. MCI Metro may now file with the Commission for resolution of the interconnection dispute identified in MCI Metro's September 6, 2002 petition.²⁶ Upon receiving the appropriate filings from MCI Metro, the Commission may only proceed to resolve the questions that the New York commission would have resolved had it chosen to act.²⁷

²¹ NY DPS Aug. 7, 2002 letter at 1-2.

²² NY DPS Comments at 1. Because the NY DPS's October 2, 2002 comments specifically contemplate the dispute between MCI Metro and Verizon, we rely upon the NY DPS's statements in these comments as evidence of the New York Commission's "failure to act" in this case. We note that, generally, we rely upon explicit orders of the state commission as evidence of a failure to act.

²³ *Id.*

²⁴ *Id.* at 2.

²⁵ Specifically, Verizon states that "[s]ection 208(a) permits persons to complain to the Commission about conduct by carriers 'in contravention of the provisions [of the Act].'" Verizon Reply Comments at 1-2. Verizon asserts that "MCI Metro does not make such a claim, just a claim that Verizon breached its contract," thus, MCI Metro's claim "is not the proper subject of a section 208 complaint." *Id.* at 2.

²⁶ Any filing that MCI Metro makes must meet the requirements of the Commission's rules governing the filing of formal complaints. See 47 C.F.R. § 1.720 *et seq.*

²⁷ See 47 C.F.R. § 51.801 (providing that the Commission "assume[s] the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter"). See also *Starpower Preemption Order*, 15 FCC Red at 11281, para. 9.

Specifically, the Commission may only resolve the following three issues: (1) whether any provision of the interconnection agreement allows Verizon unilaterally to withhold reciprocal compensation payments due pursuant to the agreement and the New York commission orders; (2) whether the *ISP Remand Order* constitutes a change of law under paragraph 8.2 of the agreement triggering the obligation to amend the agreement; and (3) if any amendment is required, what is the effective date of the amendment under paragraph 20.16 of the agreement.²⁸ We strongly encourage the parties to contact the Market Disputes Resolution Division of the Enforcement Bureau before filing to discuss how the proceedings before the Commission might best be handled. We also reiterate the finding in the *Local Competition Order* that the Commission retains exclusive jurisdiction over any proceeding or matter over which it assumes responsibility under section 252(c)(5).²⁹ Similarly, these proceedings before the Commission and any judicial review thereof shall be the exclusive remedies available to the parties.³⁰

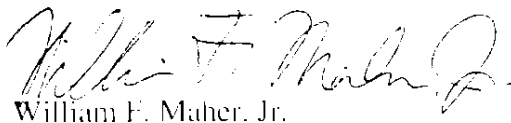
IV. CONCLUSION

12. For the foregoing reasons, we grant MCImetro's petition for Commission preemption of jurisdiction over its dispute with Verizon and invite MCImetro to file for resolution of this dispute under 47 C.F.R. § 1.720 *et seq.*

V. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, 47 U.S.C. § 252, and sections 0.91, 0.291 and 51.801(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291 and 51.801(b), the petition for Commission preemption of jurisdiction filed by MCImetro on September 6, 2002, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION



William F. Maher, Jr.

Chief, Wireline Competition Bureau

²⁸ MCImetro Petition at iv and 6 n.18.

²⁹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Red 15499, 16129, para. 1289 (1996) (*Local Competition Order*).

³⁰ 47 U.S.C. § 252(c)(6).